In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 491

UNITED STATES OF AMERICA, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Both appellees (Interstate Commerce Commission and interested railroads) have avoided, in their Motions to Affirm, the basic question presented by this appeal: Does the Interstate Commerce Act permit a railroad to absorb pier-service costs in connection with the handling of commercial freight carried under its export rates, while refusing to do so on military freight moving over the same pier, at the same time and subject to the same rates?

1. The determination of this question does not involve issues of tariff interpretation or expert appraisal of factual questions (cf. Railroads' Motion to Affirm, pp. 4–5, 9–12; Commission's Motion to Affirm, pp. 7–9, 11–12). Discriminatory charges are unlawful without regard to whether they are authorized by the published tariff. *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437–438; cf. *United States* v. *Interstate Commerce Commission*, 198 F. 2d 958 at 964–965 (C. A. D. C.), certiorari denied, 344 U. S. 893. A finding of discrimination requires, it is true, a determination that the services performed be "like and contemporaneous," on "a like kind of traffic under substantially similar circumstances and conditions" (Section 2). But there is no dispute here that the only service that has ever been rendered by the railroads is the payment to the pier operator, out of the export rate received, of a designated sum per ton for the handling of export freight on Army Base Piers 1 and 2 in Norfolk, Virginia. Appellant seeks only that the railroads continue making such payments on military traffic as they do on the commercial freight moving over the same piers at the same time. Since the railroads have never themselves undertaken the actual physical performance of the services, and since the military traffic continues to move over the same physical piers as before, whatever changed circumstances took place following resumption of

Army operation of the piers in May 1951 bears no relation to the nature of the "service" required of the carrier.

2. Both appellees repeatedly refer to the service as having been accorded "free" by the railroads. (Railroads' Motion to Affirm, pp. 5, 6, 7, 8; Commission's Motion to Affirm, pp. 6, 7, 8, 9, 10, 11). But, as the Commission itself recognized when it permitted the railroads (at the carriers' behest) to include the charges for the service as part of the line-haul rate instead of stating them separately (see Jurisdictional Statement, note 1), the absorption of wharfage and handling charges is a part of the total transportation service which the railroads undertook to perform in return for the rates paid on export freight. This Court has held that "a service covered by the line-haul rate cannot be separately compensated unless the carriers show that the line-haul rate is inadequate to cover it."[1] It is no less plain that such a service may not be abandoned in the absence of such a showing. A service subject to such restrictions is in no sense 'free," and no "conditions" imposed by the railroads can defeat their duty to provide it even-handedly.[2] That

[1] *Secretary of Agriculture* v. *United States*, 347 U. S. 645, 650.

[2] Compare this Court's statement in *Union Pacific R. R.* v. *Updike Grain Co.*, 222 U. S. 215, 220: "The carrier cannot pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar service. . . . A rule apparently fair on its face and

particular services are part of the transportation "package" for which the shipper pays does not mean either that they are "free" or that they can be rendered in discriminatory fashion.

3. Appellees urge that the Court of Appeals' decision in the earlier Norfolk case presents no conflict with the decision below, relying largely on the fact that the tariffs in the two cases are different. (Railroads' Motion to Affirm, pp. 12–13; Commission's Motion to Affirm, pp. 12–16.) But the difference in tariff terms is immaterial, since the Government's case does not rest upon interpretation of the tariff but upon the unreasonable and discriminatory practice which the carriers are pursuing under cover of the tariff.

Similarly, the fact that in this case the Commission found that other piers in the port of Norfolk were adequate to handle the traffic is immaterial. The question is whether the carriers discriminated between Army and commercial freight moving over the Army piers, not whether the shipments might have been handled at other piers. Indeed, one of the distinctions urged by the carriers (Railroads' Motion to Affirm, p. 13)—that during the Korean War the Army used only a portion of, and not the entire piers—underscores the discrimination which results from

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reasonable in its terms may, in fact, be unfair and unreasonable if it operates so as to give one an advantage of which another similarly situated cannot avail himself."

treating differently military and civilian traffic moving over the same piers at the same time.[3]

4. Appellees here rely on the very arguments which the Court of Appeals rejected in the first Norfolk case. Once again, they contend that the export rate accorded military freight was a "concession" instead of the acknowledgement of an existing obligation; that operation of the piers by the Army converted them into private piers, and thereby relieved the carriers of their duty to provide wharfage and handling on such piers; and that, in any case, the "inconvenience" caused by the new circumstances would relieve them of such duty. But, as the Court of Appeals held in the first case, the simple fact is that the Army is not a private shipper, nor is the Army base pier a "private facility" in any sense employed in the cited administrative and judicial precedents. The inapplicability of the public-private pier distinction to support the carriers' discrimination against military traffic is emphasized by the fact that at all times since 1951 the Army pier has remained open to commercial traffic (insofar as military demands permitted), whereas a truly "private" pier is closed to commercial traffic.

[3] The simultaneous presence of both military and private shipments on the same pier makes even more artificial than in the earlier case the carriers' insistence on an analogy between a private pier, owned by and run for the benefit of an industrial shipper, and a normally public pier temporarily taken over by the Army during a military emergency but still open to the public.

We submit that the principles of the first case are fully applicable here and that the District Court decision in this case conflicts with those principles.

The motions to affirm should be denied, and probable jurisdiction should be noted.

Respectfully submitted,

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